A BILL

To provide for the payment of compensation and restoration of employment benefits to certain Federal officers and employees improperly deprived thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Back Pay Act of 1961".

SEC. 2. For the purpose of this Act the term "agency" means (1) the executive departments; (2) the independent establishments in the executive branch, including corporations wholly owned or controlled by the United States; (3) the Administrative Office of the United States Courts; (4) the Library of Congress; (5) the General Accounting Office; (6) the Government Printing Office; (7) the Office of the Architect of the Capitol; (8) the Botanic Garden; and (9) the government of the District of Columbia.

SEC. 3. (a) An officer or employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable laws or regulations to have been subject to an unjustified or unwarranted personnel action which has withdrawn or reduced any part of his salary, wages, or other compensation shall be entitled upon correction of the action to be paid for the period that the action was in effect in an amount commensurate with the amount he would normally have earned had he not been subject to the action, less any amounts earned by him through other employment during such period. (b) For all other purposes, including the accumulation of leave not in excess of the maximum prescribed by law or regulation, he shall be deemed to have rendered

SEC. 4. The United States Civil Service Commission may prescribe regulations to carry out the provisions of this Act.

SEC. 5. Section 6 (b) of the Act of August 24, 1912, Ch. 389, 37 Stat. 555, as amended, (5 U.S.C. 652 (b), and the last 71 words of the third proviso of section 1 of the Act of August 26, 1950, Ch. 803, 64 Stat. 746, are repealed.

SEC. 6. This Act applies to personnel actions effected on or after the date of its enactment. The provisions of law repealed under section 5 of this Act continue in force with regard to actions taken prior to the effective date of this Act.

SECTION ANALYSIS

Most of the situations which could give rise to the retroactive payment of compensation or employment benefits under the provisions of this draft bill are already covered by the back pay provisions of Public Law 623, 80th Congress, Public Law 733, 81st Congress, the powers of the Civil Service Commission under the Veterans' Preference Act, and a number of decisions of the Comptroller General interpreting these authorities. The back pay provisions of this draft bill, however, would be more uniform and in some cases more equitable than those now available. In addition, the coverage of the draft bill is designed to encompass all employees of the executive branch and certain other agencies. Significantly, the draft bill neither requires any agency to review any kind of personnel action, nor defines or restricts the nature of corrective actions themselves. Moreover, the draft bill does not modify the procedural requirements of any formal system of appeals. All the draft bill requires is that where a right of appeal has been specifically granted by law or regulation, or where management on its own initiative has discovered a personnel action which in all equity should be reviewed, any corrective action as a consequence extended to a Federal officer or employee with respect to adjustment of compensation or employment benefits must be retroactive in its effect, complete in its remedies, and consistent in its application.

Section 1 of this draft bill authorizes the use of a short or popular title in citing this legislation.

Section 2 of the draft bill defines "agency" in sufficiently broad terms to include all parts of the executive branch, the government of the District of Columbia, and those other establishments of the Federal Government which look to the executive branch for personnel management leadership.

Section 3 (a) of the draft bill covers all officers and employees of the agencies encompassed by the definition set out in section 2. This would include all persons in both the competitive and excepted civil service.

Section 3 (a) of the draft bill in referring to "administrative determination" means a decision made by appropriate authority on its own initiative as opposed to a decision which it has been required to make in order to dispose of a formal appeal. The purpose of this provision is to grant agencies the right at their own option to correct any real injustices in the back pay area which they identify themselves, especially where no avenue of appeal may be open to the individual involved.

Section 3 (a) of the draft bill in referring to "timely appeal" means (1) a request properly made to an agency or to the Civil Service Commission seeking reconsideration of an official personnel action which has effected an employee adversely (2) initiated by an employee or his representative (3) under an appeal system or procedure established by law or regulation (4) which request has been accepted by the authority administering the particular appeals system or procedure involved. This provision of itself creates no new concepts of timeliness. On this point it relies entirely on the practices established in such other laws and regulations dealing with employee appeals as may now exist or later come into being. The purpose of this provision is to prevent employees from pressing stale claims for back pay where they themselves have slept on their rights.

Section 3 (a) of the draft bill in using the phrase, "unjustified or unwarranted personnel action", follows the language of Public Law 623, 80th Congress, the primary back pay authority at the time this proposal was drafted. All personnel actions in the administration of the Federal personnel systems are taken under some authority. Each such personnel action should be intended to be a proper exercise of the powers established by the particular law or regulation under which the action is taken. Nevertheless, occasionally errors are made in the exercise of these powers. Personnel actions which are found to reflect such errors may be defective on equitable or procedural grounds or both. The ruling interpretation of the phrase, "unjustified or unwarranted" with reference to adverse actions in the current administration of Public Law 623, 80th Congress, encompasses both equitable and procedural considerations following the decisions of the Court of Claims in Steinger v. U. S., 117 C.Cl. 30, and Garcia V. U. S., 123 C.Cl. 722, and of the Comptroller General in 34 C.G. 568.

Section 3 (a) of the draft bill in referring to "appropriate authority" means that agency, office, or official empowered under applicable law or regulation to correct or direct the correction of the unjustified or unwarranted action. In some cases this could be the Civil Service Commission as established, for example, in the Veterans' Preference Act. In many instances, such authority would be found at some level of agency management as defined in applicable regulations and delegations of authority thereunder.

Section 3 (a) uses the phrase, "applicable laws or regulations," to refer to the laws and regulations which provide the basis for operations under the Federal personnel systems. The draft bill looks to those laws and regulations which exist now or may later come into effect:

(1) to provide avenues and procedures for the reconsideration of unjustified or unwarranted personnel actions.

(2) to provide the legal basis for taking proper personnel actions and for correcting unjustified or unwarranted ones.

(3) to establish the locus of the authority to correct improper actions.

The phrase, "under applicable laws and regulations", has been placed as indicated in the draft bill in order to insure its reference to the word "found" and the phrase "appropriate authority". It precedes the phrase, "unjustified or unwarranted personnel action", in order to avoid the logical inconsistency which would be suggested by reference to "an unjustified or unwarranted personnel action under appropriate laws or regulations". As indicated previously, however, all proper personnel actions reflect an exercise of authority under an appropriate law or regulation.

Section 3 (a) of the draft bill does not enumerate the specific types of personnel actions covered because it is not the cause of the action, nor how it is labeled, which is important here. What is significant is the propriety of the action and whether or not the employee affected had his compensation reduced as a consequence. Unjustified or unwarranted separations, (including retirements), suspensions, and demotions will constitute most of the situations involved.

Section 3 (a) of the draft bill in the same spirit does not enumerate the specific types of corrective action which would constitute appropriate correction of the various types of unjustified or unwarranted personnel actions which may arise. The general term "correction" in the text of the draft bill has been used deliberately to assure that the proper administrative action, whatever it might be consistent with applicable laws or regulations, be taken before a back pay entitlement is created.

Section 3 (a) of the draft bill establishes an entitlement to back pay in any situation where a personnel action which has terminated or decreased the compensation of a Federal officer or employee is subsequently found unjustified or unwarranted and corrected by appropriate authority. For clarity the four essentials for an entitlement to back pay under this Act are set out below:

1. An official personnel action must have been taken which reduced or diminished some part of an individual's usual salary, wages, or other compensation from Federal employment. In other words, in effect, something must have been taken away.

2. The personnel action in question must have been made the subject of review by appropriate authority either because of a timely appeal or because appropriate authority on its own initiative decided to review that action. In other words, the specific action which precipitated the employee's loss must have been re-examined.

3. The personnel action in question must have been found by appropriate authority to be unjustified or unwarranted.

4. A corrective action consistent with applicable laws or regulations must have been authorized by appropriate authority as a consequence of its decision.

Section 3 (a) of the draft bill, therefore, establishes for pay purposes the principle that an employee should be made whole following the correction of an unjustified or unwarranted personnel action which reduced his compensation in some way. As would be defined in detail in the regulations, the adjustment in compensation would cover everything to which the employee normally would have been entitled. The regulations necessarily would require that the adjustment in compensation recognize any obvious things in the normal course of events which would have affected the amount of compensation. With respect to reducing that amount, these would include situations, such as: death before final adjudication of an appeal, separation or furlough as a result of reduction in force, transfer to another agency, and imprisonment for crime. With respect to increasing the amount of compensation, the draft bill assures credit for increments such as periodic within-grade increases and general pay raises to which the employee would have been entitled had he not been subject to the unjustified or unwarranted action. Public Law 623, 80th Congress, and Public Law 733, 81st Congress, unfortunately prevent crediting these increments in computing the amount of back pay. On the other hand, both Public Law 623, 80th Congress, and Public Law 733, 81st Congress, are currently interpreted as including in a back pay computation the premium pay which an employee normally would have earned. To preserve this interpretation the phrase "would normally have earned," which appears in Public Law 733, 81st Congress, and which was discussed by the Comptroller General in 34 Comp. Gen. 382, has been repeated in the draft bill.

Section 3(a) of the draft bill, following the historical precedents in this area, provides that the amount of back pay to which an employee would be entitled would be reduced by whatever amount he earned through "other employment" during the period the action was in effect. The term "other employment" is taken from Public Law 623, 80th Congress, in order to assure a continuity of interpretation on this point. Both the Court of Claims and the Comptroller General view "other employment" as encompassing only that employment engaged in to take the place of the employment the

employee had prior to the action against him. This interpretation was discussed by the Court in Jackson v. U.S., 121 C.Cl. 405, and by the Comptroller General in 32 Comp. Gen. 408. Therefore, if an employee had been separated from his position, this amount would be the difference between what his government income should have been and what he actually earned in an employment obtained to take the place of his government job. If he had been demoted, the amount to which he would be entitled would be the difference between what his income should have been in the proper grade and what it actually was at the lower grade.

Section 3 (b) of the draft bill in using the sentence, "For all other purposes, including the accumulation of leave not in excess of the maximum prescribed by law or regulation, he shall be deemed to have rendered service during the period", provides for the complete restoration of seniority, service credit toward retirement, life insurance, health insurance, and all other benefits of employment which may have been affected by the action. This is consistent with the current administration of these matters following a court or Civil Service Commission restoration order. In addition, leave accumulation, excluded specifically from the back pay provisions of Public Law 623, 80th Congress, would be authorized uniformly by this draft bill following the precedent of the more recent Public Law 733, 81st Congress. The usual ceilings on leave accumulation would be observed, as prescribed by the law or regulation covering the particular leave system to which the employee is subject.

Section 4 of the draft bill authorizes the Civil Service Commission to make such regulations as may be necessary to carry out the provisions of this proposal much as the Commission regulates in certain other pay areas. Day to day application of these regulations to individual cases would be the responsibility of the agencies concerned. The General Accounting Office would resolve specific questions in individual cases as it does other matters involving claims and demands against the Government of the United States.

Section 5 of the draft bill repeals the back pay provisions of Public Law 623, 80th Congress and Public Law 733, 81st Congress.

Section 6 of the draft bill provides that the measure shall be effective with respect to personnel actions taken on or after the date of its enactment. It is not administratively feasible to make this proposal retroactive without limitation. However, there is no more reason for making it retroactive to one date than to another. For these reasons the provisions of the draft bill would be applicable to cases arising because of unjustified or unwarranted actions taken on or after its date of enactment. Prior cases would be settled under current authorities.

Statement of Purpose and Justification

of

A Draft Bill to provide for the payment of compensation and restoration of employment benefits to certain Federal officers and employees improperly deprived thereof.

Purpose

To assure that all classes of Federal officers and employees can be treated equitably and uniformly with respect to compensation and employment benefits as a consequence of actions taken to correct unjustified or unwarranted personnel actions.

Justification

This legislative proposal consolidates what is generally referred to as "back pay" authority into one logical, equitable, and comprehensive statement of entitlement with respect to compensation and employment benefits. It is more than a codification of current back pay authorities because these authorities, while adequate in many respects, may not be applied uniformly to all similar situations and do not afford completely consistent remedies. The proposal is not entirely new, however, because it has largely selected the best elements from these familiar authorities, welded them into one principle, and proposed the use of that principle in every instance where a question of back pay can be raised. Briefly this principle holds that an employee is entitled to be made whole whenever an erroneous personnel action which has terminated or reduced his compensation is corrected by appropriate authority. Significantly this proposal is not concerned with the substance of appeal rights, the structure of the appeals process, or the precise nature of corrective actions.

This proposal could justify itself with principles of fair play or philosophical concepts of equity and justice. Fortunately for purposes of brevity, this is not necessary. It is also unnecessary to recount how the concept of back pay has been widely accepted in industry. The simple fact is that the trend in law, regulation, and interpretation demonstrates clearly that the Congress, the Courts, the agencies, and the Comptroller General have been thinking along these lines for a long time with particular emphasis on the past 15 years.

Background of Current Authorities

In 1947 it was pointed out in Congress, according to the legislative history, that a "glaring loophole in the present law" existed if an employee in the competitive service who successfully availed himself of a right of appeal could not always be reimbursed for the compensation he lost while his appeal was pending. In 1948,

after consulting the Civil Service Commission and others, Congress responded to this need by enacting Public Law 623, 80th Congress, as an amendment to the Lloyd-LaFollette Act.

Public Law 623, 80th Congress, authorizes back pay in non-security cases involving improper separations and suspensions of nonveterans with civil service status in the competitive service and all veterans who have completed their trial or probationary period. The amount of pay is computed at the rate the employee was receiving at the time of the improper action and covers the entire period the action was in effect. Leave accumulation covering the same period, however, was excluded from the other remedies to which an employee was entitled under the Act.

In 1950, with the passage of Public Law 733, 81st Congress, Congress acted again in the back pay area, this time protecting executive branch employees suspended or terminated in erroneous security actions. The amount of back pay is computed as under Public Law 623, 80th Congress; however, agency heads are authorized to determine whether the employee will be paid for all or part of the period of erroneous suspension or removal. Interestingly, agency practice under this law has been to authorize payment for the entire period almost without exception. More complete as to benefits, Public Law 733, 81st Congress, has been interpreted to permit leave accumulation covering the period of the erroneous action.

The third major source of back pay authority is the Veterans' Preference Act of 1944, as amended. This Act has been interpreted as authorizing back pay in cases involving improper demotions of veterans who have completed a trial or probationary period and in cases arising as a result of erroneous reduction in force actions whether or not the employees concerned are veterans.

In recent years the trend of Comptroller General's decisions interpreting these authorities has been toward greater flexibility. This trend notwithstanding, however, it is apparent that these authorities, as now stated, provide an inadequate basis for a full solution to the back pay problem. If the problem is to be corrected, new legislation must be the answer.

The Need for Change

Most back pay situations in the Federal service are already covered in some way by current authorities. This factor itself tends to demonstrate that the principle of back pay as a part of corrective action is well established. It suggests further that the reason the back pay picture is not complete today is more a matter of oversight than intentional arrangement. It is apparent that whenever Congress has faced the problem of back pay, it has never intended its action to discriminate against any employee who could build an equitable claim. Circumstances, unfortunately, have led to a piecemeal approach to the back pay problem.

As a consequence, veterans are now afforded broader back pay benefits than nonveterans and at any given moment there are still many veterans and nonveterans alike who could not be awarded back pay at all except in the correction of erroneous reduction in force actions. This number would include all employees serving probationary or trial periods, many nonveterans who are employed by their Government outside the competitive civil service, and all nonveterans in the competitive service in actions of demotion for cause.

Private relief legislation in individual cases cannot answer the problem, because it tends to discriminate against the person who does not seek special consideration beyond the remedies available to all. In the interests of both uniformity and equity, therefore, there is a strong case for improving the present back pay authorities. The case is particularly strong when it is recognized that the step toward a better back pay authority is a small one in terms of costs and administrative adjustments. No great number of cases should add appreciably to current costs and the handling of all back pay cases would be little different from current procedures.

Impact of the Current Proposal

There are four features to this legislative proposal which should be kept in mind in order to understand what it is designed to accomplish and, just as important, what it is not designed to do:

1. The Comprehensive Nature of this Authority. The proposal assures that back pay protection would be available to a Federal employee whenever an unjustified or unwarranted personnel action which diminished his pay is corrected in his favor. The proposal does not attempt, however, to specify the precise nature of corrective actions. It requires only that the unjustified or unwarranted action be corrected before an entitlement is created. It is inherent in the use of the term "correction" that the administrative action referred to must be one which is consistent with applicable laws and regulations. The protection does not hinge on the operation of any particular systems of appeals, but would be available as a consequence of the operation of any system of appeals. In addition, where no avenue of appeal is available, an agency itself may award back pay to an employee merely by acknowledging that its action affecting the employee adversely was unjustified or unwarranted and correcting it.

2. The Test of Diminished Income. Many things may happen to the disadvantage of the employee on the job which may have a real or potential effect on his finances -- a hoped-for promotion or job classification upgrading may be denied or delayed, a transfer to a new location may be more expensive than anticipated, a free official parking space may be lost, etc. This proposal does not deal with situations of this sort. The purpose of this proposal is only to permit an agency to make an employee whole from a pay and benefits point of view following its decision to correct an unjustified or unwarranted personnel action against him.

To accomplish its purpose this proposal uses the "test of diminished income" which must be applied in every potential back pay situation before an entitlement is established under this authority. The unjustified or unwarranted personnel action, in effect, must have taken away some part of the normal salary, wages, or other compensation of the employee affected. In other words, if no part of the employee's salary, wages, or other compensation as a Government employee was actually diminished by the improper action, there can be no claim to back pay when that action is corrected.

3. The Requirement for Timely Action. In order to preserve his right to back pay, the employee under this proposal would be required to exercise the rights of appeal open to him in a timely manner. For example, an employee whose position was downgraded would lose his right to demand back pay unless he made a timely and successful effort to appeal the downgrading action. Should that employee be promoted sometime later in a routine reallocation of his position, such reallocation would have no back pay implications.

4. The Advantages of Agency Initiative. By permitting an agency to authorize back pay on its own determination in correcting an unjustified or unwarranted personnel action, this authority introduces two new elements of flexibility which strengthen the corrective powers of management. First, when an agency discovers it has inadvertently taken an unjustified or unwarranted action, it would be free to correct the action immediately on its own initiative with an appropriate pay adjustment. This avoids the loss of time and resources involved in an appeal over a matter which the agency may feel in advance should be settled in the employee's favor. Second, when an agency desires to extend back pay adjustments uniformly to all persons in the same circumstances when an appeal is won by any one of the persons involved, it would be free to do so on its own initiative.

In a recent case, for example, a group of veterans in wage board jobs successfully appealed to the Civil Service Commission their demotions as a result of job classification downgradings and were awarded back pay. A nonveteran worker in the same group, who had no right to appeal to the Commission, benefited by the subsequent reinstatement to grade but was denied the back pay adjustment his associates received, because the agency had no authority to pay him. This proposed authority would have permitted the agency, had it desired, to authorize the same kind of adjustment to all of the employees involved.

Cost estimate

It is very difficult to assess the cost involved in this proposed bill. This is not because these costs would constitute a major expenditure. Instead it is because "added" cost is the information needed while readily available information unfortunately reveals little about current cost. Today agencies generally absorb the costs of compensating employees entitled to back pay. Under the proposed bill, no change in this is envisioned.

Potentially some agencies may have a somewhat larger number of cases involving back pay entitlement than they have at present. On the other hand with such clear-cut and comprehensive entitlement established, agencies would have an added incentive to conduct their appeal and review activities in a timely and expeditious manner in order to minimize the cost of such entitlements. Moreover, the draft bill would tend to limit the size of retroactive payments because employees who neglect to use their appeal rights, if any, in a timely manner would lose their right to demand back pay.

In the benefits area it would be virtually impossible to "cost" the accumulation of leave covering periods of improper separation or suspension as authorized by the draft bill. Taken at different times, leave has different values. In addition, while terminal lump-sum annual leave payments can represent a cash expense, sick leave should have no actual value unless the employee is ill. It would seem reasonable to assume, therefore, that this legislative proposal would create no new costs or inconveniences in the leave area more burdensome than those agencies are adjusting to now.

Those benefits to which employees are entitled on a contributory basis, such as retirement, life insurance, and health insurance, would not constitute added costs under the draft bill. The employee would continue to be required to make up his back contributions, along with his taxes, for any period during which they were not withheld. This requirement stems from the fact that where an employee having "rendered service" he also assumes a responsibility for

the obligations which that service would have imposed.

It is about as difficult to estimate the number of new back pay entitlements which would arise under this proposal as it is to assess the value of these entitlements. The size of the new groups covered in some instances is very large. Conversely, however, the potential number of back pay cases likely to arise from these groups, experience tells us, is surprisingly small. For example, the new proposal would protect career nonveterans in cases of demotion for cause. On appeal, the Commission reviews the procedural adequacy of such actions in the competitive service. Although there are about 1,000,000 nonveterans in the competitive service, there was not one appellant in these circumstances between July 1, 1959, and June 30, 1960, who would have been entitled to back pay because of Commission action. We do not know how many such cases were handled at agency levels under circumstances which would have involved back pay under this proposal. We would have to assume though that the number was fairly small because the Commission so rarely receives appeals of this kind.

Nonveteran employees in excepted positions for the first time would be entitled to back pay if they lost compensation as a consequence of unjustified or unwarranted suspensions, separations or demotions for cause. At present, these employees, and there are about 100,000 of them, have no appeal to the Civil Service Commission in such actions, and agencies have considerable flexibility in actions affecting their tenure. Under this proposal, therefore, there would be only as many new back pay entitlement cases involving these employees as procedures under agency control would generate.

This proposal would also cover, for the first time, employees serving probationary or trial periods. At any one time, there are probably between 100,000 and 175,000 such persons throughout the service. The proposal requires, however, that there can be no entitlement to back pay without a finding that the adverse action involved was unjustified or unwarranted. Compared to persons who have completed their trial period, the appeal rights of probationary employees are very limited. Naturally this would tend to keep down the number of entitlement cases.

Under section 2.301(c)(2) of the Commission's Regulations, the Commission considers appeals of terminations based on conditions arising prior to the appointment of probationers in the competitive service. In less than 100 cases last year were Commission determinations such that an employee would have been entitled to back pay. A probationary or trial period employee who is terminated for reasons occurring after employment generally does not have a right to appeal to the Commission.

In conclusion, the Commission is unable to estimate the costs of this proposal precisely without an expensive and detailed study going into the experience of each Federal agency. With the facts which are available, however, it seems safe to estimate that less than $400,000 per year in additional costs would be involved Government-wide and that most of these costs would be of the type which agencies customarily absorb in the normal course of operations. The proposed legislation will not involve additional expenditures for personnel services to administer its provisions.